IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.601 OF 2003
IN
SUMMARY SUIT NO.3097 OF 2001

M/s.Mittal Trading Co. Plaintiff

versus

M/s.Avanti Enterprises and others Defendants

Devendra Sharma for plaintiff.

I.S.Mecwan for defendants 1 and 2.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 4th July 2005

PC :

1. Heard Mr.Sharma for plaintiff and Mr.Mecwan for defendants 1 and 2. Defendants 3 and 4 are absent despite receipt of writ of summons. Affidavit proving service of writ of summons on defendants 3 and 4 is taken on record and marked "X" for identification.

2. Mr.Sharma appearing for plaintiff points out that the claim in the summary suit is arising out a written contract as evidenced by invoices and delivery challans under which the goods were

sold, supplied and delivered to the defendants by plaintiff. The details of invoices and the goods are mentioned in para 2 of the plaint. In para 3 of the plaint it has been pointed out that the defendants gave cheques of Rs.7,32,164/- (invoice amount) drawn on Vijay Bank, Wadala Branch, Mumbai. These cheques are dated 20th February 2000 and 22nd March 2000. Cheques have been dishonoured on presentation. Thereupon, para 4 of the plaint sets out details of the advocate's notice sent prior to institution of the summary suit.

3. It is contended by Mr.Sharma that not only there is a written contract but there is clear acknowledgement of liability to pay the amounts under the invoices and this is how cheques have been forwarded which on presentation have been dishonoured by the bankers. All these averments satisfy requirements of Order XXXVII of CPC, 1908.

4. Mr.Sharma additionally points out that the plaint is lodged on 31st August 2001 and the claim is not time barred.

5. As far as defendants 3 and 4 are concerned,

there is no appearance filed on their behalf. Since there is no appearance filed on their behalf, there is no question of Summons for Judgement being taken out and served on them. There is absolutely no defence to the claim as they have failed to appear.

6. Mr.Mecwan appearing for defendants 1 and 2 invites my attention to the affidavit filed in reply to the Summons for Judgement. The first contention raised therein is that the Summons for Judgement has been taken out in a summary suit, which is instituted on 1st August 2001, as late as on 10th July 2003. The delay in taking out this Summons for Judgement is not explained either in the affidavit in reply or during oral submissions. Consequently, on this ground alone, the defendants 1 and 2 are entitled to unconditional leave to defend.

7. Alternatively, he invites my attention to the fact that an affidavit in reply to this Summons for Judgement was forwarded but that was not taken on record on the ground that it was filed beyond the period of 10 days.

8. With the assistance of Mr.Sharma and

Mr.Mecwan, I have perused the affidavit in reply. That affidavit states that suit is filed to recover monies under a money lending transaction. The invoices are not genuine. They are a camouflage. The entire transaction is not what is reflected by the averments in the summary suit but a cover up of the money lending and finance transactions. A bogus suit is filed on the basis of fabricated and false invoices. The affidavit states that invoices do not show transporter's name, consignment note, packing number, lorry receipt, delivery of goods and/or courier date, transporter's name. It is then contended that the plaintiff is a money lender and it does not hold a money lending licence. However, it is pertinent to note that affidavit in reply clearly admits that Mr.Mahendra Mittal is Proprietor of Mittal Trading Company, i.e. plaintiff before me. Thus, plaintiff's descreption as a trader in the plaint and also as proprietor of a firm carrying on business in the firm name and style "Mittal Trading Company" at the office address given in the cause title of the plaint, is not denied.

9. In para 7 of the affidavit in reply, the defendants 1 and 2 state as under :-

"With reference to para 2, I deny that any order was placed by the defendants, with the plaintiffs as alleged. I deny supply of any goods whatsoever the plaintiff. Thus the question of use and/or appropriation of the goods by the defendant does not arise. It is pertinent to note that the alleged invoices are not exhibited in the plaint or annexed but only list statement of invoices is annexed, since they are forged and got up documents to cover up money lending transaction. It is also pertinent to note that all invoices nos. are in serial numbers i.e. Invoice Nos.1,2,3 & 4 are having date 22.7.99. 5, 6 & 7 are of 20.12.99. **The defendant does not deny receipt or acknowledgement of the invoices.** The Defendant denies the Defendant agreed to pay 24% interest p.a. on the stated sum or any amount whatsoever."

After stating so, it is contended that there is no sale and no purchase transaction. The entire transaction is bogus and cover up.

10. Mr.Sharma has placed the original documents on record. It is true that details in the invoices are only name of the first defendant, date and number. The goods are described. There is an acknowledgement of the first defendant stating "received goods" on the original invoices. If there was no transaction of purchase and sale as stated by the defendants 1 and 2, then there was no question of forwarding two cheques after invoices have been received. Para 7 of the affidavit admits receipt of

invoices. If there was no transaction of sale and purchase then the invoices would not have been bearing a remark "received goods" above the stamp of the firm. Similarly, the cheques would not have been forwarded. Pertinently, one of cheque is signed by defendant no.2. It is, therefore, clear that the defences are raised with a view to delay the claim in the suit.

11. In 2001(1)-BLR-823 a Division Bench of this Court has reiterated the object of institution of summary suits. That is following the decisions of Supreme Court rendered as far back as in 1953 and 1964. The object is that there should be some sanctity to commercial transactions and parties do not wriggle out of their obligations under written contracts. This decision of the Division Bench also deals with consequences when Summons for Judgement is not taken out within the period prescribed by Rule 227 of the Bombay High Court, Original Side Rules. The delay is not always fatal. Merely because it is unexplained does not mean that the defendants are entitled to unconditional leave. Ultimately, it depends upon facts and circumstances of each case. In the present case, the Summons for Judgement is taken out on 10th July 2003. Writ of summons were

served as pointed out in the affidavit proving service on various dates and it is only when an appearance was filed by defendants 1 and 2, that Summons for Judgement was taken out expeditiously. It is not the case of Mr.Mecwan that there has been inordinate delay in taking out Summons for Judgement after the appearance has been filed on behalf of defendants 1 and 2. Therefore, submission of Mr.Mecwan is without any substance. In any event, it is not open for defendants 1 and 2 to raise this issue when they themselves have delayed filing of affidavit in reply to the Summons for Judgement. That affidavit, despite delay, has been taken on record.

12. Having considered the rival contentions, in my view, the defences raised are not substantial but frivolous and vexatious. They are not enough to show mercy to defendants 1 and 2 to make good their case set out on affidavit. It is a case where partners have received goods and on behalf of firm they handed over cheques in repayment of invoice value, which are dishonoured. Some of the partners are not even appearing.

13. Original documents along with list taken on

record and marked "X" for identification. In the light of the above conclusions, there shall be a decree as prayed. Refund of court fees as well as computation of advocates' costs as per rules.

(S.C.DHARMADHIKARI, J.)